IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1923

THE HOME TELEPHONE AND TELEGRAPH COMPANY OF SPOKANE, a corporation,
Appellant,

v.

E. V. KUYKENDALL, as Director of Public Works of Washington, HANCE H. CLELAND, as Supervisor of Public Utilities of Washington, and FRANK R. SPINNING, as Supervisor of Transportation of Washington, the persons constituting the Department of Public Works of the State of Washington, and JOHN H. DUNBAR, Attorney General of the State of Washington.
Appellees.

No. 539

MOTION TO DISMISS

JOHN H. DUNBAR,
Attorney General of the State of Washington.

RAYMOND W. CLIFFORD,
Assistant Attorney General of the State of Washington.

H. C. BRODIE,
Counsel for Appellees.

INDEX.

Page

Acknowledgment of Service..... 3

Notice 5

Motion to Dismiss..... 7

Statement 8

Argument 11

Cases cited:

American Book Co. v. Kansas, 193 U. S. 49 11

Atherton Mills v. Johnston, 259 U. S. 16 11

Brownlow v. Schwartz, 67 L. Ed. 288.... 11

Heitmuller v. Stokes, 256 U. S. 359..... 11

Mills v. Green, 159 U. S. 651..... 11

Shaffer v. Carter, 252 U. S. 37, 64 L. Ed. 445 11

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THE HOME TELEPHONE AND TELEGRAPH COMPANY OF SPOKANE, a corporation, *Appellant*, v. E. V. KUYKENDALL, as Director of Public Works of Washington, *et al.*, *Appellees*.	No. 539

ACKNOWLEDGMENT OF SERVICE

Service of a copy of the within Notice, Motion to Dismiss, Statement and Argument is hereby admitted by the undersigned at Seattle, Washington, this 11th day of February, 1924.

C. M. BRACELEN,
OTTO B. RUPP,
H. D. PILLSBURY,
FRANK T. POST,
W. V. TANNER,
Counsel for Appellant.

In the Supreme Court of the United States

OCTOBER TERM, 1923

THE HOME TELEPHONE AND TELEGRAPH COMPANY OF SPOKANE, a corporation, *Appellant*,
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No. 539

NOTICE

TO THE HOME TELEPHONE AND TELEGRAPH COMPANY OF SPOKANE, a corporation, Appellant, and to C. M. BRACELEN, OTTO B. RUPP, H. D. PILLSBURY, FRANK T. POST and W. V. TANNER, counsel for appellant:

Please take notice that on Monday, March 24, 1924, at 12 o'clock, noon, or as soon thereafter as counsel may be heard, the appellees herein will submit to the consideration of the court their motion to dismiss, copy of which is attached.

JOHN H. DUNBAR,
Attorney General of the State of Washington,

RAYMOND W. CLIFFORD,
Assistant Attorney General of the State of Washington,

H. C. BRODIE,
Counsel for Appellees.

In the Supreme Court of the United States

OCTOBER TERM, 1923

THE HOME TELEPHONE AND TELEGRAPH COMPANY OF SPOKANE, a corporation, *Appellant*,
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E. V. KUYKENDALL, as Director of Public Works of Washington, *et al.*, *Appellees*.
No. 539

MOTION TO DISMISS

Now come the appellees herein and move the court to dismiss the appeal from an order denying an interlocutory injunction herein upon the following grounds:

I.

That this court will not review the order denying an interlocutory injunction for the reason that the question of relief *pendente lite* has become moot by dismissal of the complaint therein.

JOHN H. DUNBAR,
Attorney General of the State of Washington,

RAYMOND W. CLIFFORD,
Assistant Attorney General of the State of Washington,

H. C. BRODIE,
Counsel for Appellees.

STATEMENT.

For the purpose of the motion hereinbefore set out, the facts involved may be stated as follows:

The Home Telephone and Telegraph Company of Spokane, on the 24th day of April, 1923, filed in the district court of the United States, for the western district of Washington, southern division, its bill of complaint against the appellees herein. In said complaint, in addition to other matters, the appellants prayed for a temporary injunction to restrain the appellees herein from enforcing a certain rate order of the department of public works of the state of Washington. On April 30, 1923, the application of the appellant for an interlocutory injunction came on to be heard before the statutory court of three judges provided for in section 266 of the Judicial Code, and said application was denied, and from said order this appeal was prosecuted to this court.

Thereafter such proceedings were had in said case in the district court as resulted in the entry of an order dismissing the bill of complaint therein by the said court on the 5th day of January, 1924. From said order of dismissal, an appeal has been taken to this court and is now pending herein as cause No. ..... The transcript of record in said appeal from said final order has not yet been printed, but for the information of the court in passing on this motion, said order of dismissal is set forth in full as follows:

In the District Court of the United States, for the Western District of Washington

SOUTHERN DIVISION

IN EQUITY, No. 167-E

THE HOME TELEPHONE AND TELEGRAPH COMPANY OF SPOKANE, a corporation,
Plaintiff,

v.

E. V. KUYKENDALL, as Director of Public Works of Washington, HANCE H. CLELAND, as Supervisor of Public Utilities of Washington, and FRANK R. SPINNING, as Supervisor of Transportation of Washington, the persons constituting the Department of Public Works of the State of Washington, and JOHN H. DUNBAR, Attorney General of the State of Washington.
Defendants.

DECREE

This cause having come on regularly for hearing in this court on the 31st day of December, 1923, upon the defendants' motion to dismiss the bill of complaint filed herein, plaintiff being represented by Messrs. Otto B. Rupp and W. V. Tanner, its solicitors, and the defendants being represented by John H. Dunbar, Attorney General of the State of Washington, and Raymond W. Clifford, his assistant, and Messrs. H. C. Brodie, Thomas J. L. Kennedy, E. K. Murray, J. M. Geraghty and Alex M.

Winston, their solicitors, and after hearing the arguments of counsel for the respective parties, the court having announced its oral opinion and decision that the motion to dismiss should be sustained upon the grounds that the bill of complaint herein does not state any matters of equity entitling the complainant to the relief prayed for; that said bill of complaint does not state facts sufficient to entitle complainant to any relief against the defendants; and that said bill has been prematurely brought, by reason of the failure to exhaust the right of plaintiff to relief in the superior and supreme courts of the state of Washington;

Now, on this 5th day of January, 1924, the parties herein now appearing by their respective counsel, on motion of the defendants, pursuant to such decision of the court, it is by the court hereby ORDERED, ADJUDGED and DECREED that said motion to dismiss be and it is hereby granted, and that said bill of complaint and this cause of action be and the same hereby are dismissed, and that the defendants have and recover their costs and disbursements herein.

To the foregoing, and each and every part thereof, the plaintiff excepts, and its exception is allowed.

Done in open court this 5th day of January, 1924.

EDWARD E. CUSHMAN,
Judge.

ARGUMENT.

I.

The application for an interlocutory injunction was an application for relief *pendente lite,* and upon the dismissal of the litigation by the foregoing final order, no relief *pendente lite* could be afforded and the question of such relief becomes a moot question, and under innumerable decisions of this court, a moot question will not be passed upon.

Brownlow v. Schwartz, 67 L. ed. 288,
Atherton Mills v. Johnston, 259 U. S. 16,
Heitmuller v. Stokes, 256 U. S. 359,
American Book Company v. Kansas, 193 U. S. 49,
Mills v. Green, 159 U. S. 651,

and numerous other cases cited in the above cases.

II.

When an appeal has been taken from an order denying an interlocutory injunction, and thereafter an order is entered dismissing the complaint and an appeal is prosecuted from such final order of dismissal, the interlocutory appeal should be dismissed and the case considered on the appeal from the final order of dismissal.

Shaffer v. Carter, 252 U. S. 37, 64 L. ed. 445.

It is therefore respectfully submitted that the motion to dismiss the appeal from the order denying an interlocutory injunction should be granted.

JOHN H. DUNBAR,
Attorney General of the State of Washington,

RAYMOND W. CLIFFORD,
Assistant Attorney General of the State of Washington,

H. C. BRODIE,
Counsel for Appellees.

Supreme Court
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In the Supreme Court of the United States,

OCTOBER TERM, 1923.

THE HOME TELEPHONE AND TELEGRAPH COMPANY OF SPOKANE, a corporation, *Appellant*,

v.

E. V. KUYKENDALL, as Director of Public Works of Washington, HANCE H. CLELAND, as Supervisor of Public Utilities of Washington, and FRANK R. SPINNING, as Supervisor of Transportation of Washington, the persons constituting the Department of Public Works of the State of Washington, and JOHN H. DUNBAR, Attorney General of the State of Washington, *Appellees*.

APPEAL FROM AN ORDER DENYING AN INTERLOCUTORY INJUNCTION.

Brief of Appellant in Opposition to Motion to Dismiss Appeal.

C. M. BRACELEN,
W. V. TANNER,
Of Counsel.

OTTO B. RUPP,
FRANK T. POST,
H. D. PILLSBURY,
Solicitors for Appellant.

Law Brief Printing Co., Seattle

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APPEAL FROM AN ORDER DENYING AN INTERLOCUTORY INJUNCTION.

Brief of Appellant in Opposition to Motion to Dismiss Appeal.

Statement.

This case is a companion of a suit pending in this court entitled The Pacific Telephone and Telegraph Company, a corporation, Appellant, v. Kuykendall, et al, Appellees, same being cause No. 540.

This is an appeal from an order entered April 30, 1923, by a statutory court convened pursuant to section 266 of the Judicial Code denying an application of The Home Telephone and Telegraph Company of Spokane, appellant here, for an interlocutory injunction to restrain the appellees from enforcing a confiscatory rate order of the Department of Public Works of the State of Washington. This denial was not on the merits but upon the sole ground that appellant had not as yet exhausted its purported legislative remedies in the state courts of Washington.

After the denial of the interlocutory injunction, the District Judge refused to proceed in the main case. Thereupon, The Pacific Telephone and Telegraph Company, which had a like case pending in the same court, made an application to the Circuit Court of Appeals for the Ninth Circuit for a writ of mandamus commanding the District Judge to proceed in the case brought by The Pacific Telephone and Telegraph Company. The writ was granted. (Pacific Tel. & Tel. Co. v. Cushman, District Judge, 292 Fed. 930.) Thereafter, the District Judge did proceed in this case, and on January 5, 1924, entered a decree dismissing the complaint in this case. From this decree of dismissal,

an appeal was likewise taken to this court and is now pending herein as cause No. 789. On motion an order was made on February 25, 1924, advancing this cause No. 539 and the related cause No. 799 on the calendar, and setting them down for argument together on April 14, 1924.

Meanwhile the appellees on February 11, 1924, moved to dismiss the appeal in this cause, arguing that the question therein involved had become moot. This motion was noted for argument for March 24, 1924.

In view of this court's order advancing this cause and cause No. 789 for argument on the merits on April 14, 1924, it would seem desirable that the whole argument in these two related cases be had on the same day rather than piecemeal, and that therefore the motion to dismiss the appeal should be passed for consideration until April 14th.

The argument in this case is identical with the argument made on behalf of The Pacific Telephone and Telegraph Company in case No. 540. For convenience sake only, we reprint that argument here.

Argument.

In order to determine whether appellees' motion to dismiss the appeal on the ground that the question has become moot, is well taken, the precise nature of the question involved in this appeal and the status of the litigation must be considered.

The only question before the court on this appeal from the order denying an injunction *pendente lite* is whether appellant had the right to sue in the United States court at the time it filed its complaint, or whether as a condition precedent appellant was first required to exhaust its alleged legislative remedies in the state courts of Washington.

As already stated the statutory court did not pass on the merits. Hence, on this appeal, this court will determine the jurisdictional question only, and if it holds that the statutory court was wrong in refusing to pass on the merits of the application, will remand the cause to the statutory court for that purpose.

An analogous situation was presented in *Oklahoma Natural Gas Co. v. Russell*, 261 U. S. 290, 293, where, after determining that the statutory court

erred in refusing to pass on the merits of the application for an interlocutory injunction, this court said:

"As in our opinion the District Court had jurisdiction and a duty to try the question whether preliminary injunctions should issue, and as that question has not yet been considered, the cases should be remanded to that Court, with directions to proceed to the trial. Generally it is not desirable that we should pass upon such matters until they have been dealt with below."

As, therefore, this court will not in general pass on the merits of the application for relief *pendente lite* before that question has been considered below, there is in this appeal no question of injunctive *relief* but merely a jurisdictional question.

Clearly, the argument of the appellees, that the question is moot because *no relief pendente lite* may be granted, is unsound because no relief *pendente lite* would be granted by this court in any event. Hence it cannot be said that the case is moot on the usual ground that a decree would be wholly ineffectual and inoperative. If moot at all, it must be on some other ground. But this cause can only be moot if the adjudication of the jurisdictional question has become wholly immaterial. Has it? The answer is that question depends upon whether

the litigation has ceased or is still pending. If the litigation is still pending, then the question of jurisdiction in this case, as in every other case, is still a vital one; in fact, it is the *sine qua non* of the suit. Although after the present appeal from the order of the statutory court denying relief *pendente lite*, the trial judge during subsequent proceedings in the main cause below dismissed the complaint, yet an appeal from the decree was immediately taken. That a cause on appeal is still a pending cause hardly requires citation of authority.

Ex parte Craig, 274 Fed. 177, 187;

Gore v. Stacpoole, 1 Dow. (H. L.) 18, 31;

Holland v. Fox, 3 El. & Bl. 977, 985;

Howell v. Bowers, 2 Cr. M. & R. 621;

Brasch v. Brasch, 50 Neb. 73;

Boone v. Boone, 160 Iowa 284;

Hupp v. Hocking Oil & Natural Gas Co., 88 Ohio St. 61;

Ex parte James Mumford, 57 Mo. 603, 606;

In re Egan, 24 S. D. 301;

State Board of Examiners v. Hart, 104 Minn. 88;

Pemberton v. Pemberton, 169 Ky. 476.

As the cause is still pending, the jurisdictional question must be determined. The motion to dis-

miss this appeal, therefore, raises only a question of practice: whether the jurisdictional question will be determined on this appeal from the order of the statutory court, or on the appeal from the decree of dismissal of the District Judge. The question not being moot and section 266 of the Judicial Code having provided for a separate appeal from an order denying the interlocutory injunction, it would seem that the question should be determined in the appeal where it is first raised.

Counsel rely upon *Shaffer v. Carter*, 252 U. S. 37, but they misconstrue the effect of that decision. In that case there were two appeals from a single decree rendered in a suit in equity heard before a statutory court. The statutory court not only denied the application for the interlocutory injunction, but also dismissed the complaint by the same decree. Assuming that the statutory court which, under section 266, is expressly given only the power to grant or deny an interlocutory injunction, also has the power to dismiss the complaint for want of equity, still in that case there was only one decree, a final decree, in which was merged the order denying the interlocutory injunction. Obviously an appeal could not be taken from that final decree on the theory that it was interlocutory but only on the theory that the decree was final. That case is,

therefore, merely authority for the proposition that where a statutory court (convened pursuant to section 266) in addition to denying the application for an interlocutory injunction dismisses the complaint in the same decree, an appeal should be taken from the final decree of dismissal under section 238 of the Judicial Code.

Here the situation is entirely different. In this case an appeal is taken, pursuant to section 266, from an order of the statutory court, denying relief *pendente lite*, and eight months later the District Judge, in whose court the main case was pending, entered a decree of dismissal from which an appeal is taken. Here it can hardly be said that an order of the statutory court is merged in the final decree of the District Judge. There can be no merger under such circumstances. If, therefore, the question involved in the appeal from the interlocutory injunction is not moot and if the order of the statutory court is not merged in the decree of dismissal of the District Judge, then the appeal in this cause cannot be dismissed but it must be determined in due course.

In the case of *Male v. The Atchison, Topeka & Santa Fe Railroad Company*, 240 U. S. 97, a motion

was made to dismiss an appeal for want of jurisdiction. The reason assigned for the motion was that the question involved on the appeal had become moot in that after the rendition of the order of the lower court declining to take jurisdiction, the appellant had sued upon the same alleged cause of action in the Supreme Court of the State of New York, where a final judgment on the merits was entered dismissing the complaint. This court refused to dismiss the appeal, assigning as its reason for its refusal that it was concerned with the jurisdictional question only, and that the motion to dismiss was based on matter going to the merits. This court, therefore, proceeded to determine the question as to whether the lower court as a United States court had power to entertain the cause.

So in the present case the question before this court is whether the statutory court as a United States court should have entertained the cause and passed upon the question of relief *pendente lite.* This question still remains regardless of the decree of dismissal of the District Judge, from which an appeal has also been taken.

It may possibly be that if, after the decree of dismissal was entered in this cause by the District Judge, no appeal had been taken therefrom, and the

time for appeal had expired, this court might not adjudicate the question whether the statutory court should have assumed jurisdiction, but such is not the case.

The case of the *City of Wallace v. Deane* (Idaho) 69 Pac. 62 is in point. In that case an appeal was taken from an order of the District Court dissolving a temporary injunction. Subsequently in the main cause below a final judgment was entered in favor of the defendant, from which final judgment no appeal was taken and the *time for appeal had expired.* Upon this ground the motion to dismiss the appeal was sustained since the controversy had completely ceased. Applying that reasoning to the present case, it follows that where an appeal has been taken from a final judgment dismissing the complaint, the controversy has not ceased and an appeal from an order denying a temporary injunction still presents a justiciable question.

Should this court, however, be of the opinion that the jurisdictional question should not be separately considered upon the present appeal, it will and must consider that question upon appeal from the final decree of the District Judge dismissing the complaint. This is true because this court must in any event determine the jurisdictional question, and

secondly because if the appeal from the denial of the interlocutory injunction will not be separately considered, still upon appeal from the final decree every interlocutory order affecting the rights of the parties regarding the matters in question between them, is subject to review in the appellate court and will be decided at the same time.

Central Trust Company v. Seasongood, 130 U. S. 482;

Perkins v. Fourniquet, 6 How. 206, 209;

Forgay v. Conrad, 6 How. 201;

Texas Company v. Central Fuel Oil Co., 194 Fed. 1, 22;

Western Union Telegraph Co. v. The U. S. and Mexican Trust Company, 221 Fed. 545, 551.

While the rule of these cases ordinarily applies only where no separate appeal is provided by statute from an interlocutory order, still if in the opinion of this court the condition of this cause is now such that the appeal from the interlocutory order should no longer be separately considered, then the rule applies with full force and this court will, upon appeal from the final decree, consider the

question of whether the interlocutory order was properly made.

Respectfully submitted,

OTTO B. RUPP,
FRANK T. POST,
H. D. PILLSBURY,
Solicitors for Appellant.

W. V. TANNER,
C. M. BRACELEN,
Of Counsel.